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No. 254

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE COMFY MANUFACTURING COMPANY AND FRED E. KATZNER, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION FOR MODIFICATION OF JUDGMENT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

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Appellants have moved this Court to modify its order of October 14, 1957, which affirmed *per curiam* the judgment of the district court, so as to vacate paragraph VI (C) of that judgment. The principal ground of the motion is that paragraph VI (C), which enjoins appellants from granting to retailers special discounts, advertising allowances or return privileges which are not available to others "on proportionately equal terms," is so "vague and indefinite" as to "impose an intolerable risk of contempt liability" (Motion, p. 9).[1]

[1] Appellants also argue (Motion, pp. 2–5) that paragraph VI (C) was improperly included in the judgment. That contention was fully answered at pages 28–29 of the Government's Motion to Affirm.

Appellants did not make this contention either in the district court (although they objected to paragraph VI (C) on another ground),[2] or in this Court in their Jurisdictional Statement or in their Brief in Opposition to the Government's Motion to Affirm. In these circumstances, such a belated attempt to raise the issue, after this Court already has affirmed the judgment below, must be rejected. Although we believe that paragraph VI (C) is sufficiently specific so that appellants "may know their duties and unintended contempts may not occur" (*International Salt Co.* v. *United States*, 332 U. S. 392, 400), we submit that the proper, indeed the only, way for appellants to raise the issue of vagueness at this stage of the case is by petitioning the district court, pursuant to paragraph XI of the judgment, for construction or modification of paragraph VI (C).[3] Cf. *International Salt, supra*, at 401–402.

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[2] Paragraph VI contains a number of provisions enjoining various restrictive trade practices. In their objections to the Government's proposed judgment (which included paragraph VI (C) in its present form), appellants urged only that paragraph VI in its entirety was improper, on the ground that there was nothing in the court's opinion to justify any injunctive relief against the trade practices. Defendants' Memorandum in Opposition to the Government's Proposed Final Judgment, pp. 1–3; Transcript of Hearing on Exceptions of Defendants Sure-Fit and Comfy to Proposed Final Judgment, December 31, 1956, pp. 49–51, 87–88, 91–92.

[3] In paragraph XI the district court retained jurisdiction "for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate to the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof * * *."

It is respectfully submitted, therefore, that the
otion for modification of the judgment should be
nied.

J. LEE RANKIN,
Solicitor General.

NOVEMBER 1957.

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